

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

PITTSBURGH-CANFIELD CORPORATION,  
*et al.*,

Debtors.

CASE NUMBER 00-43394

\*\*\*\*\*

WHEELING PITTSBURGH STEEL CO.,

Plaintiff,

vs.

PENNZOIL PRODUCTS CO., *et al.*,

Defendants.

ADVERSARY NUMBER 02-4573

\*\*\*\*\*

M E M O R A N D U M O P I N I O N

\*\*\*\*\*

The motion before the Court is the Motion of Pennzoil Quaker State Company to Dismiss Adversary Proceeding for Lack of Personal Jurisdiction, Insufficiency of Process, Insufficiency of Service of Process and Expiration of Applicable Time Periods (the "Motion to Dismiss") and the Affidavit of Anne-Marie Roy in support thereof, which were filed on May 19, 2004, and the Memorandum in Opposition to Motion of Pennzoil-Quaker State Company to Dismiss Adversary Pro-ceeding for Lack of Personal Jurisdiction, Insufficiency of Process, Insufficiency of Service of Process and Expiration of Applicable Time Periods (the "W-P Opposition") filed by Wheeling Pittsburgh Steel Co. ("Wheeling-Pittsburgh"), which was

filed on May 26, 2004.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F) and (O).

#### **BACKGROUND**

Wheeling-Pittsburgh filed its Chapter 11 bankruptcy petition on November 16, 2000 and is now a reorganized debtor under Debtors' Third Amended Joint Plan of Reorganization, confirmed by order of this Court on June 18, 2003 (D.I. 2130).

Wheeling-Pittsburgh timely filed 366 complaints seeking avoidance of preference payments and/or fraudulent transfers (the "Avoidance Actions") against various defendants on or about November 13 and 14, 2002. Wheeling-Pittsburgh requested issuance of summons from the Clerk of Courts for these complaints in May 2003.

On or about February 5, 2003, Wheeling-Pittsburgh moved the Court to, among other things, extend the time for service of summons on the Avoidance Action defendants (D.I. 1759). On or about February 19, 2003, the Court issued an order (D.I. 1803) granting Wheeling-Pittsburgh's motion and allowing Wheeling-Pittsburgh to serve summons until September 12, 2003. On or about September 12, 2003, Wheeling-Pittsburgh again moved (D.I. 2312) the Court to, among other things, extend the time for service of summons on the Avoidance Action defendants. On or about October

6, 2003, the Court issued an order (D.I. 2344) granting Wheeling-Pittsburgh's second motion and allowing service of summons until January 12, 2004. On or about January 9, 2004, Wheeling-Pittsburgh moved the Court yet again for an order extending the time to serve summons on the Avoidance Action defendants (the "January 9, 2004 Motion") (D.I. 2416). In the January 9, 2004 Motion, Wheeling-Pittsburgh (referred to therein as "WPSC") stated as follows:

9. WPSC intends now to move for default judgment against the Avoidance Action defendants who have not yet responded to complaints filed against them. WPSC anticipates that, despite its best efforts to obtain good service, one or more of the Avoidance Action defendants will assert insufficiency or failure of service of process as a defense. WPSC desires to have additional time to serve a second summons upon those Avoidance Action defendants who assert such a defense.

Wheeling-Pittsburgh specifically stated in paragraph 16 of the January 9, 2004 Motion that: "The Debtors further submit that the Avoidance Action defendants who have not appeared are not there-fore entitled to notice of this Motion; thus the Motion need not be filed in each Avoidance Action." Accordingly, Wheeling-Pittsburgh admits that Pennzoil-Quaker State Company ("Pennzoil") did not receive copies of the motions to extend certain procedures for preference and fraudulent transfer actions, which included extensions of time to serve summons.

The Court entered the Order Extending Certain Procedures for Preference and Fraudulent Transfer Actions on February 5, 2004

(D.I. 2433). This order provided at decretal paragraph (a) "WPSC may seek issuance of a second summons from the Court to serve on the defendant, together with a copy of the filed complaint in the Avoidance Action, by or before April 12, 2004, or within a longer period as ordered by the Court; . . . ."

Wheeling-Pittsburgh initiated the adversary proceedings against Pennzoil by filing a complaint on November 14, 2002, and on May 15, 2003, requested that a summons be issued on Pennzoil Products Co. On June 5, 2003, an alias summons was issued on Pennzoil Products Co. Almost a year later, on May 19, 2004, Pennzoil filed a motion to appear *pro hac vice* and filed the Motion to Dismiss. On May 24, 2004, the Court entered an order granting the *pro hac vice* motion. On May 26, 2004, Wheeling-Pittsburgh filed the W-P Opposition to the Motion to Dismiss. On November 9, 2004, in response to an order from the Court, the parties filed a joint status report concerning this adversary proceeding. Although the parties indicated in the joint status report that Defendant had moved to dismiss the proceeding and that the motion remained pending before the Court, the only "pertinent issue in dispute" identified by the parties was as follows:

There is little or no dispute that Defendant received, within ninety days of Wheeling-Pitt filing its voluntary petition, the payments detailed in Exhibit A to the Complaint. The parties will likely dispute whether any of those payments may be avoided pursuant to the affirmative defenses set forth in 11 U.S.C. § 547.

Under additional information to assist the Court, the parties indicated "[n]one." The specific dispute over lack of personal juris-diction, insufficiency of process and insufficiency of service of process was not brought to the Court's attention until a status conference on April 4, 2005.

#### **PENNZOIL'S CONTENTIONS**

Pennzoil asserts in its Motion to Dismiss that this Court must dismiss the adversary proceeding for (i) lack of personal juris-diction; (ii) insufficiency of process; (iii) insufficiency of service of process; and (iv) expiration of applicable time periods.<sup>1</sup> Pennzoil specifically states that "[t]he filing of this motion is not intended and should not be construed to be an admission of personal juris-diction by this Court over Pennzoil." See, Motion to Dismiss, ¶ 1. Pennzoil asserts the following pertinent facts.

- ! In 1998, Pennzoil Products Co. changed its name to Pennzoil-Quaker State Company.
- ! On November 14, 2002, Wheeling-Pittsburgh filed a com-plaint against Pennzoil alleging that Pennzoil had received Three Hundred Fifteen Thousand One Hundred Forty-Nine and 76/100 Dollars (\$315,149.76) in the 90-day period prior to Debtor's bankruptcy case, which receipt is the subject of this adversary pro-ceeding.
- ! The Court's docket shows that the Court issued a summons and notice of telephonic pretrial conference in this case on May 15, 2003 (the "Initial

---

<sup>1</sup>Pennzoil was evidently unaware that Wheeling-Pittsburgh had been granted until April 12, 2004 to serve the summons in this adversary proceeding.

Summons").

- ! The Court's docket does not reflect a proof of service for the Initial Summons.
- ! On June 5, 2003, the Court issued a second summons and notice of telephonic pretrial conference in the adversary proceeding (the "Second Summons").
- ! The Court's docket does not reflect proof of service for the Second Summons.
- ! On March 30, 2004, Pennzoil received a letter from Wheeling-Pittsburgh regarding an offer to settle the adversary proceeding for Seventy-Five Thousand Dollars (\$75,000.00) (the "Settlement Letter"). The Settlement Letter included the following documents (i) the Second Summons; (ii) a certificate of service dated June 6, 2003, purporting to certify that service was made on Pennzoil-Quaker State at 8140 Quality Drive, Prince George, VA 23875-3006 (the "Prince George Address"), Attn: Registered Agent; (iii) the Complaint; (iv) a letter dated December 20, 2002, addressed to Pennzoil Products Co., 100 Pennzoil Drive, Johnstown, PA 15909-4232 from the Calfee Halter & Griswold LLP law firm regarding potential preferences; and (v) a letter dated June 4, 2003, to the Clerk of the United States Bankruptcy Court, requesting the Clerk to sign the corrected summons due to the expiration of the forwarding address order.
- ! Debtor addressed the Settlement Letter to Pennzoil Products Co. at the Prince George Address.
- ! From 2000 to 2002, Pennzoil's officers were located at 700 Milam, Houston, Texas.
- ! From 2003 to the present, Pennzoil's officers continue to be located at both 700 Milam, Houston, Texas, and at 910 Louisiana, Houston, Texas.
- ! From June 16, 2000 to January 5, 2004, Pennzoil's registered agent in Virginia was Commonwealth Legal Services Corporation, 4701 Cox Road, Suite 301, Glen Allen, VA 23060-6802, and from January 5, 2004 to the present, Pennzoil's registered agent was and continues to be CT Corporation System, 4701 Cox

Road, Suite 301, Glen Allen, VA 23060-6802.

! Before receiving the Settlement Letter, Pennzoil had no knowledge of this adversary proceeding and had never been properly served with a copy of either the Initial Summons and Complaint or the Second Summons and Complaint.

Pennzoil asserts that the Court must quash service as being improper and also dismiss the adversary proceeding. Pennzoil argues that in order for service to be proper, Wheeling-Pittsburgh had to effect service under either Federal Rule of Bankruptcy Procedure 7004(b)(3) or under Federal Rule of Civil Procedure 4(h)(1). Pennzoil alleges that Debtor failed to comply with the service rules in either of the two attempts it made to serve Pennzoil. Pennzoil also specifically argues that, contrary to the allegations in Wheeling-Pittsburgh's January 9, 2004 Motion, Wheeling-Pittsburgh failed to use its "best efforts to obtain good service" because it did not make any investigation about whether either of the addresses it used would effect service as required by the Bankruptcy and Federal Rules. Pennzoil argues that Wheeling-Pittsburgh did not mail the summons and complaints to the attention of an officer, or a managing or general agent of the corporation as required by Rule 7004(b)(3). Although the Second Summons was allegedly sent to the attention of the "registered agent," it was not sent to the address of the registered agent. Pennzoil states that neither Pennzoil's officers nor its registered agents is or was located at the Prince George Address. Pennzoil

contends that the record reflects absolutely no efforts on the part of Debtor to determine (i) the name of the actual registered agent for Pennzoil or (ii) the correct address for Pennzoil's registered agent. As a consequence, Pennzoil argues that, because of the insufficient process and service of process, this Court lacks personal jurisdiction over Pennzoil.

Pennzoil further argues that it did not receive the Settle-ment Letter until March 30, 2004 and that Wheeling-Pittsburgh's extension of time to perfect service expired on January 12, 2004. Wheeling-Pittsburgh alleges that Pennzoil is wrong on this point, having obtained a further extension until April 12, 2004 to perfect service. This Court finds that Pennzoil's argument that Wheeling-Pittsburgh's time to perfect service expired on January 12, 2004 is flawed and that Wheeling-Pittsburgh was permitted until April 12, 2004 to perfect service by issuing a Second Summons.

#### **WHEELING-PITTSBURGH'S CONTENTIONS**

Wheeling-Pittsburgh argues in its opposition that Pennzoil's Motion to Dismiss elevates form over substance; since Pennzoil knew of the pendency of this adversary proceeding and communicated with Wheeling-Pittsburgh about it, Pennzoil should not be allowed to avoid liability on a technicality. Wheeling-Pittsburgh argues that, even if the Court should find that service of the Second Summons was technically defective, it is "entitled"



to an extension of time under Federal Rule of Bankruptcy Procedure 7004(a) and Federal Rule of Civil Procedure 4(m) to perfect service.

Wheeling-Pittsburgh contends that service of the Second Summons was effective because Pennzoil did receive, by mail, copies of the summons and complaint via the Settlement Letter on March 30, 2004. Wheeling-Pittsburgh also argues that Pennzoil was "in possession of the summons and complaint weeks before making its motion." Wheeling-Pittsburgh further states that "Pennzoil offers no explanation why, if it received the summons and complaint on March 30, it waited over seven weeks to make its Motion." See, W-P Opposition, at 6. Wheeling-Pittsburgh complains that the seven-week delay should operate as a waiver of Pennzoil's objections to service of process. This stands in contrast, however, to Wheeling-Pittsburgh's request for a further extension of time to perfect service, which it supports as follows: "Wheeling-Pitt would only need a few days to make service, and the Court's deadline of April 12, 2004 has only *recently* passed." See, W-P Opposition, at 9 (emphasis added). Wheeling-Pittsburgh's opposition was filed on May 26, 2004 - six weeks after the April 12, 2004 deadline. Wheeling-Pittsburgh defines a six-week period as "recent" while arguing that a seven-week "delay" constitutes a waiver. This Court finds Wheeling-Pittsburgh's argument that Pennzoil waited too long to file the Motion to Dismiss to be disingenuous.

Wheeling-Pittsburgh also states that Pennzoil either intentionally or negligently gave Wheeling-Pittsburgh the impression that service was unobjectionable when it contacted Wheeling-Pittsburgh's in-house counsel and requested an extension of time to respond to the Settlement Letter. The attachment to the W-P Opposition, however, only shows that Pennzoil requested "at least a few more days" to respond to the Settlement Letter, which was dated March 30, 2004, since Wheeling-Pittsburgh had requested a response by April 8, 2004. There is nothing in the attached correspondence to indicate anything other than an inability to reply by the short deadline set by Wheeling-Pittsburgh in the Settlement Letter. The fact that Wheeling-Pittsburgh sent Pennzoil the Settlement Letter less than two weeks before the expiration of the April 12, 2004 deadline to perfect service has, in part, created the problem about which Wheeling-Pittsburgh now complains.

#### **SUFFICIENCY OF PROCESS AND SERVICE OF PROCESS**

The Complaint and Second Summons were addressed to "registered agent" and mailed to the Prince George Address in June 2003. This was not the correct address for Pennzoil's registered agent nor was it the correct address for Pennzoil's officers - even if the envelope had been properly addressed to the attention of a Pennzoil officer. Wheeling-Pittsburgh's attempt to serve the Complaint and Second Summons in June 2003 did not comply with Federal Rule of Bankruptcy Procedure 7004(b)(3) or Federal Rule of

Civil Procedure 4(h).<sup>2</sup> Wheeling-Pittsburgh's argument that Pennzoil's notice of the pending adversary proceeding makes up for the technical defect in service is unavailing. "Ohio courts agree with the Sixth Circuit that actual knowledge and lack of prejudice cannot take the place of legally sufficient service." *LSJ Inv. Co., Inc. v. O.L.D., Inc.*, 167 F.3d 320, 324 (6th Cir. 1999) (citations omitted). See also *Grand Entm't Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 492 (3rd Cir. 1993). "Although

---

<sup>2</sup>Rule 7004. Process; Service of Summons, Complaint.

(b) **Service by First Class Mail.** Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)-(j) FR Civ P, service may be made within the United States by first class mail postage prepaid as follows:

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

#### **Rule 4. Summons**

(h) **Service Upon Corporations and Associations.** Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

notice underpins Federal Rule of Civil Procedure 4 concerning service, notice cannot by itself validate an otherwise defective service. Proper service is still a prerequisite to personal jurisdiction." In the present case, Wheeling-Pittsburgh attempted to serve the "registered agent," but made no effort to determine the correct name or address of Pennzoil's registered agent. The instant case is distinguishable from *Schwab v. Associates Commercial Corp.* (*In re C.V.H. Transport, Inc.*), 254 B.R. 331 (Bankr. M.D. Pa. 2000), wherein the plaintiff trustee mailed a preference complaint to the defendant corporation at its correct address, addressed to the attention of the corporation's "officer, managing or general agent" without specifying the name of an individual officer or agent. In *C.V.H. Transport*, the court found service of the initial complaint to be proper. In contrast, however, the complaint and summons here were addressed generally to the "registered agent" of Pennzoil (at that time Commonwealth Legal Services Corporation) at an address where the registered agent was not located.

This Court finds that Wheeling-Pittsburgh has not properly served the summons and complaint, as required by Federal Rule of Bankruptcy Procedure 7004 and Federal Rule of Civil Procedure 4. Wheeling-Pittsburgh argues that, even if service of process was defective, it is "entitled" to additional time to perfect service pursuant to Federal Rule of Civil Procedure 4(m)

and Federal Rule of Bankruptcy Procedure 7004(a).<sup>3</sup> Wheeling-Pittsburgh, however, must show "good cause" in order for the Court to extend the time for service. Wheeling-Pittsburgh has not established "good cause" for a fourth extension of time to perfect service of this adversary proceeding on Pennzoil. Wheeling-Pittsburgh, in seeking its third extension of time to perfect service, stated that it anticipated that some parties would argue that service has not been properly made and Wheeling-Pittsburgh wanted additional time to correct that error. However, to date, Wheeling-Pittsburgh has made no effort to properly serve Pennzoil with a copy of the summons and complaint. It certainly knew as early as May 12, 2004 (approximately one month after the expiration of the third extension of time to perfect service) that Pennzoil argued that it had not been properly served. Instead of

---

<sup>3</sup>**Rule 4. Summons**

**(m) Time Limit for Service.** If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

**Rule 7004. Process; Service of Summons, Complaint.**

**(a) Summons; Service; Proof of Service.** Rule 4(a), (b), (c)(1), (d)(1), (e)-(j), (l), and (m) FR Civ P applies in adversary proceedings. Personal service pursuant to Rule 4(e)-(j) FR Civ P may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

seeking leave of the Court to perfect service at that time, Wheeling-Pittsburgh relied solely on the Settlement Letter, to which had been appended a copy of the Second Summons and Complaint, as effective service of the summons and complaint. The Second Summons was issued in June 2003 and was not mailed (even under Wheeling-Pittsburgh's characterization of service) to Pennzoil until March 30, 2004 (more than nine months after its issuance). The complaint was filed in November 2002 - approximately two and one-half years ago. Although this Motion to Dismiss was filed 11 months ago (a year and a half after the complaint was filed), the parties did nothing to bring the pending motion to the Court's attention except to refer to it generally in the joint status report - which was filed only because the Court ordered that a status report be filed. Wheeling-Pittsburgh has done nothing to move this case forward or to attempt to obtain proper service. A defendant must be able to timely defend itself without being prejudiced by a lengthy passage of time. Accordingly, this Court finds that Pennzoil's Motion to Dismiss is well taken and hereby grants the Motion to Dismiss.

An appropriate order shall enter.

---

**HONORABLE KAY WOODS**  
**UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

PITTSBURGH-CANFIELD CORPORATION, \*  
et al., \*  
43394

CASE NUMBER 00-

Debtors.

\*\*\*\*\*  
WHEELING PITTSBURGH STEEL CO., \*

Plaintiff,

vs.  
4573

ADVERSARY NUMBER 02-

PENNZOIL PRODUCTS CO., et al., \*

Defendants.

\*\*\*\*\*  
\*\*\*

O R D E R

\*\*\*\*\*  
\*\*\*

For the reasons set forth in this Court's Memorandum Opinion entered this date, the Motion of Pennzoil-Quaker State Company to Dismiss Adversary Proceeding for Lack of Personal Jurisdiction, Insufficiency of Process, Insufficiency of Service of Process and Expiration of Applicable Time Periods is granted.

IT IS SO ORDERED.

\_\_\_\_\_  
HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE





**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Opinion and Order were placed in the United States Mail this \_\_\_\_\_ day of April, 2005, addressed to:

MICHAEL E. WILES, ESQ., Debevoise & Plimpton,  
875 Third Avenue, New York, NY 10022.

JAMES M. LAWNICZAK, ESQ. and RONALD M.  
McMILLAN, ESQ., Calfee, Halter & Griswold LLP,  
1400 McDonald Investment Center, 800 Superior  
Avenue, Cleveland, OH 44114.

SHARON MARIE BEAUSOLEIL-MAYER, ESQ. and EVELYN  
H. BIERY, ESQ., Fulbright & Jaworski L.L.P.,  
1301 McKinney, Suite 5100, Houston, TX 77010.

SAUL EISEN, United States Trustee, BP America  
Building, 200 Public Square, 20th Floor, Suite  
3300, Cleveland, OH 44114.

---

JOANNA M. ARMSTRONG